Supreme Court, U. S.
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80-119

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,
Respondent,

vs.

CHARLES H. GILL, a/k/a
"Papa Gill",
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

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UNITED STATES OF AMERICA,
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Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Your Petitioner, Charles H. Gill, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in these proceedings on June 26, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is as of yet unreported and is reproduced in the Appendix hereto as Appendix A.

JURISDICTION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri of one count of possession of a Schedule II controlled substance (cocaine) with intent to distribute in violation of 21 U.S.C. Section 841 (a)(1). The judgment of the Court of Appeals for the Eighth Circuit was entered on June 26, 1980. This petition for writ of certiorari was filed within thirty days after that final judgment. This Court's jurisdiction is invoked under Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court erred in its finding that the Enhanced Sentencing Provisions of Title 21, United States Code, Sections 841(b) (1)(A) and 851 were correctly applied to petitioner.

II.

Whether the Court erred in denying petitioner's Motion to Suppress Evidence Seized pursuant to a defective search warrant.

III.

Whether the Court erred in denying petitioner's Motion to Disclose the Identity of the Informant for the reason that disclosure was relevant and helpful to the defense and essential to a fair determination of the cause.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Amendment To The Constition Of The United States

IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes Of the United States

Title 21, United States Code

§ 841. Prohibited acts A

(a) Unlawful Acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance. § 841 (b) (1) (A)

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than 25,000.00, or both. If any person commits such a

violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000.00, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

§ 851. Proceedings to Establish Prior Convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, *unless before trial,* or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such fact. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

Rule Cited

Federal Rules of Criminal Procedure

Rule 23. Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

STATEMENT OF THE CASE

This is an appeal by Charles H. Gill, defendant below, from a conviction on a one-count indictment charging him with violation of Title 21, United States Code, Section 841 (a) (1), possession of approximately five ounces of cocaine with intent to distribute. The evidence upon which the conviction was based was seized pursuant to a warrant and affidavits on or about July 21, 1979: a confidential informant supplied the information in the affidavit. Petitioner was sentenced, after a finding of guilt in stipulated facts, pursuant to the enhanced sentencing provisions of Title 21, United States Code, Sections 841 (b) (1) (A) and 851.

The indictment on which petitioner was arraigned on July 30, 1979, charged a one-count violation of Title 21, United States Code, Section 841 (a) (1). There was no attempt to utilize enhanced sentencing provisions of Title 21, United States Code, Sections 841 (b) (1) (A) and 851. Petitioner pled not guilty at the arraignment and filed pretrial motions, including a Motion to Quash the Warrant, a Motion to Suppress Evidence Seized thereunder and a Motion to Compel the Government to Disclose the Identity of the Informant. After a hearing on the motions, the Federal Magistrate Court recommended the Motions be overruled. The trial court adopted this holding and the Eighth Circuit Court of Appeals affirmed.

On November 5, 1979, all parties appeared in court and announced that petitioner would waive a jury trial and that the

case would be submitted on stipulated facts. No objection was made to these announcements at any time, by either the Court, the Government or Petitioner. The trial court stated that for various purposes, it was regarding November 5, 1979, as the start of the trial. No objection to this was made.

On November 6, 1979, the *after* the trial began, the Government filed a Substitute Criminal Information seeking to apply the enhancement provisions of Title 21, United States Code, Sections 841 (b) (1) (A) and 851. The Substitute Information is reproduced as Appendix B. Petitioner filed a timely Motion to Dismiss, reproduced as Appendix C, based on the untimely filing and inapplicability of the enhanced sentencing provisions. The trial court, whose first finding of fact on this Motion was that the Substitute Information had been filed during the trial, overruled petitioner's Motion to Dismiss only after the government misinformed it of the date of filing; i.e., after the government stated incorrectly that the Substitute Information had been filed on November 3, 1979, *not* November 6, 1979.

With regard to the search which yielded the evidence upon which the conviction was based, the following occurred: Detectives Mokwa and Gober swore out affidavits for a search warrant to search the premises at 2922 University, a building used as a single family residence. These affidavits contained information from a confidential informant who also described the building at 2922 University as a single family dwelling. The affidavits are reproduced as Appendix D.

A warrant was issued for the search of 2922 University (with two front doors: 2922 and 2922A). The separate residences of Vertie Gill, who resided at 2922 University, and of Petitioner who resided at 2922A University, were searched. The evidence was seized from 2922A University. The evidence at the suppression hearing established that, contrary to the information sworn to by the detectives and the confidential informant, the building was a multi-family dwelling, and that petitioner resided in the

separate residence of 2922A University, not 2922 University. Stated differently, petitioner established that the information and belief of the confidential informant and the detectives were false in part. The Court noted that a belief by the detectives that the premises were single family would have been unreasonable.

Petitioner attempted to further attack the validity of the affidavits by requesting disclosure of the identity of the confidential informant. This Motion was denied on the basis that the remaining unchallenged information of the confidential informant was sufficient to establish probable cause to search.

Petitioner's challenge to the warrant and the reliability of the informant were, therefore, never addressed.

Petitioner filed a timely appeal subsequent to the District Court Judgment of conviction. The United States Court of Appeals affirmed the conviction in a panel decision handed down June 16, 1980. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Court Below Erred In Holding That The Enhanced Sentencing Provisions Of Title 21, United States Code, Sections 841 (b) (1) (A) And 851 Were Correctly Applied to Petitioner.

All parties and the Eighth Circuit Court of Appeals agree that the procedures of Title 21, United States Code, Section 851 are mandatory and restrict the Court's authority to enhance sentencing unless the information seeking enhancement is filed with the Court and served with the defendant before trial. *United States* v. *Gill,* Appendix A, at 3-4; *United States* v. *Noland,* 419 U.S. 966 (1974).

Dispositive of this issue is a determination as to when petitioner's trial began. The Eighth Circuit erroneously overruled a finding of fact made by the trial court, without determining that the fact was clearly erroneous and inappropriately relied upon a double jeopardy analysis, to come to its finding that the trial began on December 3, 1979. It held that the indictment filed November 6, 1979 which invoked the enhanced sentencing provisions was timely filed pursuant to Title 21, United States Code, Section 851 and that petitioner was correctly sentenced as a second offender.

The pertinent facts are as follows: On July 30, 1979, petitioner was arraigned on the charge of violation of Title 21, United States Code, Section 841(a) (1). On November 5, 1979, the parties appeared in Court and stated their intent to submit the case on stipulated facts and to waive a trial by jury. No objection was made. In response, the District Court stated that ". . . for various purposes, the Court is regarding today as a *start* of a, quote, trial of this matter". *United States* v. *Gill, supra,* at 4 (emphasis added). No objection was made by petitioner or the government. On November 6, 1979, the day *after* the trial began, the government filed a substitute information seeking to invoke for the first time the enhanced sentencing pro-

visions of Title 21, United States Code, Sections 841 (b) (1) (A) and 851. This substitute information is reproduced as Appendix B. Petitioner timely filed a Motion to Dismiss the Substitute Information based on the government's non-compliance with the mandatory provisions of Title 21, United States Code, Section 851. Petitioner's Motion to Dismiss is reproduced as Appendix C.

On December 3, 1979, the parties submitted the stipulated facts and the Court formally approved Petitioner's waiver of a jury trial. At the January 3, 1980, hearing, petitioner again raised his objection to the substitute information. At the sentencing hearing on January 11, 1980, the Court found that the substitute information was filed *during* the trial. The Court amended this finding of fact only when the government erroneously informed the Court that the Substitute Information had been filed on November 3, 1979. Only then did the District Court apply the enhancement provisions of Title 21, United States Code, Sections 841 (b) (1) (A) and 851.

The Eighth Circuit Court of Appeals found as a fact that the trial began on December 3, 1979. It did so by reading into Rule 23 of the Federal Rules of Criminal Procedure a non-existent time element regarding the start of a trial; by erroneously resting its holding on the date when the waiver of a jury trial became effective, an issue never raised by petitioner, the government or the Court; and by rejecting an express finding of fact made by the District Court, without determining that the District Court finding of fact was clearly erroneous. The latter directly conflicts with *United States* v. *Abel,* 258 F2d 485 (2nd Cir., 1958), Aff'd 361 U.S. 2217, rehearing denied 362 U.S. 984.

The Eighth Circuit Court of Appeals also drew support in its determination of when the trial began from cases dealing with the issue of double jeopardy. *United States* v. *Gill, supra* at 4. This reliance is misplaced for double jeopardy applies to the proof of a substantive crime, *not* to sentencing provisions. As

noted in *Oyler* v. *Boyles,* 368 U.S. 448 (1962), the determination of whether one is an habitual criminal is essentially *independent* of the determination of guilt of the underlying substantive offense: though the habitual criminal issue may be combined with the trial of the felony charge, it is a *distinct* issue and may appropriately be the subject of a separate determination. (emphasis added).

The Federal Rules of Criminal Procedure and federal case law are silent on the issue of when a trial, based upon stipulated facts, begins. Faced with this problem, the trial court made an express factual finding that the trial began on November 5, 1979. No objection to this finding of fact was ever made, nor did the Eighth Circuit Court of Appeals ever find this fact to be clearly erroneous. The direct conflict with *United States* v. *Abel, supra,* and the grave consequences of the enhanced sentence to which petitioner has been subject require this Court to address the issue of when the trial began and to determine that the Eighth Circuit Court of Appeals erroneously held that the enhanced sentencing provisions were correctly applied. This cause should be remanded to the trial court for resentencing in accordance with the provisions of Title 21, United States Code, Section 841 (b) (a) (I).

II.

II. The Court Erred In Denying Petitioner's Motion To Suppress Evidence Because It Was Seized Pursuant To A Defective Search Warrant.

The evidence seized should have been suppressed for the reason that there was no probable cause in the affidavits to justify the search, and because the warrant on its face was too general.

On or about July 21, the Honorable Lackland Bloom, Circuit Court Judge for the City of St. Louis, Missouri, issued a search warrant for ". . . 2922 University, a two story brick residence

with an attic, used as a *single family* dwelling with two front doors (2922 and 2922A). . ." (emphasis added). Affidavits in support of the warrant, based in part on information from a confidential informant, were sworn out by two detectives. These affidavits are reproduced as Appendix D. On July 21, 1979, the *two family* residence of 2922 and 2922A University was searched. Evidence was not seized from the residence described in the warrant, i.e., 2922 University, the home of Vertie Gill. Evidence was seized from petitioner's separate residence at 2922A University.

On August 13, 1979, petitioner filed Motions to Quash the Search Warrant, To Suppress Evidence and To Compel Disclosure of the Identity of the Informant. The District Court denied all of these Motions, and the Eighth Circuit Court of Appeals affirmed.

The Fourth Amendment to the United States Constitution requires that the search of a residence be supported by probable cause. Petitioner acknowledges that to find probable cause, a court may *resort* to consideration of supporting and attached affidavits in conjunction with the warrant. *United States* v. *Johnson,* 541 F.2d 133 (8th Cir. 1976). That is, the Court may consider the content of both the warrant and the affidavits to find probable cause to search a residence.

It is Petitioner's contention that the courts below erred in replying on the probable cause tests of *Aguilar* v. *Texas,* 378 U.S. 108 (1965) and *Spinelli* v. *United States,* 393 U.S. 410 (1969), and erred in not critically evaluating the content of the affidavits. First, the affidavits, the evidence at the suppression hearing and the opinion of the Eighth Circuit Court of Appeals all establish that the source of the information in the affidavits was a confidential informant.

Second, the evidence at the suppression hearing and the Court's opinion establish that part of the information received from the confidential informant was false, or made with

reckless disregard for the truth. For instance, the informant stated that petitioner's residence was 2922 University, but the evidence established that petitioner resided at 2922A University. The informant who claimed to have been inside the building stated that it was a single family dwelling; the evidence established that the building was a two-family dwelling. The Eighth Circuit Court of Appeals even noted that for the detectives to have believed the residence was single family would have been unreasonable in view of the external indicia of multiple residence (*i.e.*, two mail boxes, two front doors, etc.).

Third, petitioner's request that the identity of the informant be disclosed was denied (See Argument III, *infra).* Thus, neither the petitioner nor the court had the opportunity to cross examine the informant as to the remaining content of the affidavits or to determine his credibility.

Fourth, the Eighth Circuit Court of Appeals did not credit the unreasonable belief of detectives as to the single family character of the building to an informant who called it single family after having allegedly been inside. Rather, the court took judicial notice of the reliability of the remainder of the informant's statement, ignored the proven falsities of the informant, and relied upon the cases of *Aguilar* and *Spinelli, supra,* to find probable cause.

Petitioner contends that the reliance on the probable cause tests of *Aguilar* and *Spinelli, supra,* is misplaced. Those cases deal with the situation in which the confidential informant is reliable. The facts of the instant case indicate an informant who is unreliable in part, and whose remaining reliability is vouched for by detectives whom the Court notes have made factual misstatements and held unreasonable beliefs.

Given the above false statements and inconsistencies, the Court should have examined the affidavits in support of the warrant with a critical eye. This is particularly true given that petitioner requested but was denied the opportunity to examine

the informant. It was encumbent upon the Court to excise the affidavits from its consideration of the sufficiency of the warrants pursuant to *Franks* v. *Delaware,* 98 S.Ct. 2674 (1978); petitioner had made a substantial showing that false statements by the informant had been included in the affidavits knowingly, intentionally or with reckless disregard for the truth.

The Court should have excised the affidavits from the consideration of probable cause and considered whether the warrant on its face was sufficient; *i.e.,* whether the warrant on its face described the place to be searched with sufficient particularity to justify seizure of the evidence. Had the Court applied the probable cause tests of the cases dealing with multi, rather than single family dwellings, to the warrant, the search would have failed and the evidence been ordered suppressed. A request to search the single family dwelling of 2922 University (a residence which, in fact, was never searched) would not have justified a search of an entirely different and distinct residence, 2922A University. *United States* v. *Dorsey,* 519 F.2d 922 (D.C. Cir. 1978); *United States* v. *Davis,* 557 F.2d 1239 (8th Cir.), *cert. den.,* 434 U.S. 971 (1977); *United States* v. *Hinton,* 219 F.2d 324 (7th Cir. 1955). A warrant authorizing the search of 2922 University, falsely and unreasonably characterizing it as a single family dwelling, is *not* sufficient to support the search of 2922A University, a separate, distinct and independent residence.

In summary, the Eighth Circuit Court of Appeals reliance upon the probable cause tests of *Aguilar* and *Spinelli, supra,* was incorrect. This Court should examine the affidavits critically and excise them from the question of whether there was probable cause to search. Subsequent application of the correct probable cause tests of *Dorsey, Davis* and *Hinton, supra,* will indicate that the warrant on its face was defective and that the evidence seized should have been suppressed. This Court should order the evidence suppressed, or, alternatively, should vacate the holding of the Eighth Circuit Court of Appeals and remand

the case to that Court with instructions directing the District Court to reconsider the reliability of the affidavits and the sufficiency of the warrant.

III.

III. **The Court Erred In Denying Petitioner's Motion To Disclose The Identity Of The Informant For The Reason That Disclosure Was Relevant And Essential To The Fair Determination Of The Case.**

The Eighth Circuit Court of Appeals did not address the issue of whether petitioner was entitled to disclosure of the identity of the informant. The District Court's denial of petitioner's Motion was affirmed in a two pronged holding: first, the holding that there was probable cause to search rendered this issue moot. Second, the United States Supreme Court has never considered this issue.

As noted in Argument II, *supra,* the Eighth Circuit Court of Appeals' holding that there was probable cause to search was erroneous. As the warrant on its face was insufficient to support a search of a private residence, *United States* v. *Dorsey,* 591 F.2d 922 (D.C. Cir. 1978); *United States* v. *Davis,* 557 F.2d 1239 (8th Cir.), *cert. den.,* 434 U.S. 971 (1977); *United States* v. *Hinton,* 219 F.2d 324 (7th Cir. 1955), the Court considered the warrant together with the supporting affidavits. *United States* v. *Johnson,* 541 F.2d 133 (8th Cir. 1976). The facts adduced at the suppression hearing indicated that the confidential informant who supplied the information had, in part, supplied facts which were false or made with reckless disregard of the truth. The only means by which the Court could find probable cause, therefore, was to judicially determine the credibility and reliability of a witness who had never been examined, but who had been found to have made statements which were in part untrue. (See Argument II, *supra.)* There are no facts in the record to support this judicial determination, or the subsequent reliance on the prob-

able cause tests of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 383 U.S. 410 (1969). In fact, the Court indicated that a belief that the building was a single family residence, as stated by the informant, would have been unreasonable.

The alternative to the judicial determination of reliability was to compel disclosure of the informant. Disclosure of the informant and an in-Court examination of his reliability was an available means to determine probable cause. This alternative, requested by petitioner, was not permitted.

Additionally, the facts of petitioner's case (see Statement of the Case and Argument II, *supra,)* make this one in which the unanswered issue in *Franks* v. *Delaware,* 438 U.S. 154 (1979), may be resolved. That case permitted a defendant to question the validity of an affidavit supporting a search warrant. There, as here, there had been a substantial showing that the detectives made false statements intentionally, knowingly or with reckless disregard for the truth. There, as here, the issue is the determination of probable cause to search. Here is the additional element of false statements intentionally, knowingly or recklessly made by a confidential informant.

The facts of this case and the erroneous determination of the probable cause issue discussed in Argument II, *supra,* require this Court to address the issue of disclosure of the informant and to answer the unanswered question in *Franks* v. *Delaware, supra,* affirmatively.

CONCLUSION

Petitioner believes that this Petition raises issued of exceptional importance which were either incorrectly decided or not resolved below. For these reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 80-1095

United States of America, Appellee, v. Charles Gill a/k/a Papa Gill, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: May 21, 1980
Filed: June 26, 1980

Before BRIGHT, HENLEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Charles H. Gill appeals from a judgment entered in the district court[1] finding him guilty of one count of possession of a Schedule II controlled substance (cocaine) with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Appellant was sentenced to a term of twenty-five years imprisonment, plus a special parole term of ten years, and a $20,000 fine under the sentence enhancement provisions of 21 U.S.C. §§ 841(b)(1)(A),

[1] The Honorable H. Kenneth Wangelin, Chief Judge, United States District Court for the Eastern District of Missouri.

851. For reversal appellant argues that the district court erred (1) in imposing an enhanced sentence, (2) in denying his motion to suppress, and (3) in denying his motion for disclosure of the identity of a confidential informant. For the reasons discussed below, we affirm the judgment of the district court.

We note that this case was tried to the district court on written stipulations. Appellant does not challenge the sufficiency of the evidence. On July 21, 1979, following a narcotics investigation, two City of St. Louis police officers obtained a search warrant for premises described in the warrant as "2922 University, a two story brick residence with an attic, used as a single family dwelling with two front doors (2922 and 2922A)."[2] The police officers searched both 2922 and 2922A University. Nothing was found in 2922 University. Inside 2922A University the officers observed appellant trying to push something under a bed. A briefcase was recovered from under the bed; inside the briefcase was approximately five ounces of a powdery substance subsequently identified as cocaine and $28,000. The officers also found narcotics paraphernalia used in weighing and packaging drugs for distribution.[3] Appellant was arrested and advised of his rights. At this point appellant made several incriminating remarks. The district court found appellant guilty of possession of cocaine with intent to distribute. This appeal followed.

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[2] The building in question is a single structure of two stories. Each floor constitutes a separate residence; the upstairs is 2922A, the downstairs, 2922. It is a two-family building. As noted by appellant, the residences have separate doors, mailing addresses, telephones and utilities. Appellant's mother owns the building and lives with another son in 2922; appellant lives upstairs and pays rent and his own utilities.

[3] The officers found strainers, measuring spoons, a scale, fourteen packages of mannite (a cutting agent), 3500 one-gram vials, and 2 two-gram vials. The officers also found numerous firearms and a large amount of property, some in original packaging, believed to be stolen.

I. Sentencing

Appellant argues that the district court improperly imposed an enhanced sentence under 21 U.S.C. §§ 841(b)(1)(A), 851. The maximum penalty for a violation of 21 U.S.C. § 841(a)(1) is fifteen years imprisonment and/or a fine of $25,000, plus a minimum special parole term of three years. The penalty maximum doubles for persons with one or more prior narcotics convictions. 21 U.S.C. § 841(b)(1)(A). The procedure for establishing prior convictions and thus invoking the enhanced sentencing provisions is set forth in 21 U.S.C. § 851, which provides in part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, *unless before trial* . . . the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1) (emphasis added). Appellant contends that his trial began on November 5, 1979. Because the government did not file the information for enhancement of sentence until November 6, 1979, appellant argues the information was not filed before trial as required by 21 U.S.C. § 851. Therefore, appellant concludes the district court improperly imposed an enhanced sentence.

We agree with appellant that § 851 "is phrased in mandatory language. The words '[n]o person . . . shall be sentenced to increased punishment . . . unless . . . .' restrict the court's authority to impose enhanced sentences to cases where the information is filed with the court and served on the defendant before trial." *United States* v. *Noland,* 495 F.2d 529, 533 (5th Cir.), *cert. denied,* 419 U.S. 966 (1974). In the present case, however, we conclude that appellant's trial did not begin until December 3, 1979. Therefore, the government's information for enhancement of sentence was filed before trial.

We are not unsympathetic to appellant's position, which is based in part upon the district court's statement on November 5 that "For various purposes the Court is regarding today as a start of a, quote, trial of this matter."[4] The fact that this was a bench-tried case, submitted on written stipulations, also makes it difficult to determine when the trial began. We note, however, that on December 3 the district court approved appellant's waiver of jury trial, received the written stipulations and took the cause under submission. A criminal trial conducted without a jury cannot proceed until the district court approves the defendant's waiver of jury trial, with the consent of the government. Rule 23(a), Fed. R. Crim. P.; *see, e.g., Dixon* v. *United States,* 110 U.S. App. D.C. 275, 292 F.2d 768, 769 (1961). Further, we draw support from the general rule in the context of double jeopardy that the trial in a non-jury case begins with the introduction of evidence, that is, the submission of the written stipulations in the present case. *E.g., Serfass* v. *United States,* 420 U.S. 377, 388 (1975); *United States* v. *Bullock,* 579 F.2d 1116, 1118 (8th Cir.) (per curiam), *cert. denied,* 439 U.S. 967 (1978).

II. Motion to Suppress

Appellant argues that the district court erroneously denied his motion to suppress evidence seized during the execution of the search warrant. First, appellant argues that the warrant failed to describe the place to be searched with sufficient particularity. Specifically, appellant contends the warrant description does not include 2922A University. The incriminating evidence was found in 2922A University. As noted, the warrant described the place to be searched as "2922 University, a two story brick residence with an attic, used as a single family dwelling with two

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[4] *United States* v. *Gill,* No. 79-95-CR(1) (E.D. Mo.) (transcript of oral proceedings, Nov. 5, 1979, at 6). We regard the government's incorrect reference to November 3 as the filing date of the substitute information as a mistake.

front doors (2922 and 2922A)." Using a variation of the "single residence specificity" requirement developed in cases involving multiple residential units within a building, *e.g.*, *United States* v. *Dorsey,* 192 U.S. App. D.C. 313, 591 F.2d 922, 928-30 (1978) (rooming house); *United States* v. *Davis,* 557 F.2d 1239, 1247-48 (8th Cir.) (large house subdivided into apartments), *cert denied,* 434 U.S. 971 (1977); *United States* v. *Hinton,* 219 F.2d 324, 325-26 (7th Cir. 1955) (apartment building), appellant contends the scope of the warrant should be limited to the residence identified by the street address, that is, to 2922 University only. We must disagree.

> The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

United States v. *Gitcho,* 601 F.2d 369, 371 (8th Cir.) (citations omitted), *cert. denied,* 100 S. Ct. 148 (1979).

> The traditional rule is that the generality of a warrant cannot be cured by the specificity of the affidavit which supports it because, due to the fundamental distinction between the two, the affidavit is neither part of the warrant nor available for defining the scope of the warrant. . . . However, where the affidavit is incorporated into the warrant, it has been held that the warrant may properly be construed with reference to the affidavit for purposes of sustaining the particularity of the premises to be searched, provided that a) the affidavit accompanies the warrant, and b) the warrant uses suitable words of reference which incorporate the affidavit therein.

United States v. *Johnson,* 541 F.2d 1311, 1315 (8th Cir. 1976) (other citations omitted), *citing Moore* v. *United States,* 149

U.S. App. D.C. 150, 461 F.2d 1236, 1238 (1972); *see also* 2 W. LaFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §4.5(a), at 73-74 (1978) (hereinafter LaFAVE TREATISE). In the present case the affidavits were physically attached to the warrant and incorporated by suitable words of reference.

Reviewing the warrant together with the affidavits, we conclude the warrant description was sufficient and reasonably included 2922A University. The case is a close one. The street address given in the warrant is less inclusive than the architectural description of the premises ("a two story brick residence with an attic") and the affidavits requested a search warrant for 2922 University. Nonetheless, the street address and architectural description were correct and accurate. The officers executing the warrant were the affiants and thus personally knew which premises were intended to be searched. The officers had placed the building under surveillance as part of their investigation. In addition, the affidavits contain information from a reliable informant that drug transactions were made from both front doors and that drugs were kept on both floors of the building. In sum, we are persuaded that "[t]he premises which were intended to be searched were, in fact, those actually searched." *United States* v. *Gitcho, supra,* 601 F.2d at 372 (citations omitted).

We distinguish those cases cited by appellant on the issue of single residence specificity. Single residence specificity cases typically involve a search warrant which contains a broad description covering search residential units. *See, e.g., United States* v. *Dorsey, supra,* 591 F.2d at 929-30 (cases cited herein);[5] 2 LaFAVE TREATISE, *supra,* § 4.5(b). "Federal courts long

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[5] For example, the building at issue in *United States* v. *Davis* and *United States* v. *Dorsey* were large houses which had been subdivided into apartments. In each case there were few "external indicia of multiple occupancy." *United States* v. *Dorsey, supra,* 591 F.2d at 930.

have held that police officers, before they constitutionally may search a separate residential unit within an apartment building, must have probable cause to do so that is specifically related to that unit." *United States* v. *Dorsey, supra,* 591 F.2d at 928, *citing United States* v. *Hinton, supra,* 219 F.2d at 325-26. Thus, at issue in these cases is whether the police knew, or with reasonable investigation could have found out, that the building described in the warrant contained multiple residences, a fact which would place the police "under a responsibility to pinpoint the offending unit or units." *United States* v. *Dorsey, supra,* 591 F.2d at 929.

In the present case, however, the description in the search warrant was inconsistent rather than too general; the specific street address was less inclusive than the building description. To fall within the characteristics of a typical single residence specificity case, the warrant description would have referred to the entire building and the target of the search would have been one of several residences. Under those circumstances, assuming there was probable cause shown to search only one of the several residences, *see* discussion *infra,* at issue would have been the reasonableness of the police officers' belief that the building was in fact a single residence.[6] Moreover, further assuming the reasonableness of the police officers' belief that the building was a single residence, any defect in the description in the warrant in our hypothetical may be cured by the attachment and incorporation of more specific affidavits. *See Moore* v. *United States, supra,* 149 U.S. App. D.C. at 151-52, 461 F.2d at 1237-38 (warrant which failed to specify one of two apartments on "2nd Floor" of specified apartment building was upheld because attached affidavit referred to apartment "#7").

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[6] In my view, in the hypothetical fact situation, the police officers' belief that the building was in fact a single family residence would have been unreasonable in light of the outward signs of multiple occupancy (two front doors, separate addresses and mailboxes).

Appellant also argues that there was no probable cause to support the issuance of a search warrant for 2922*A* University. Appellant argues that the building in question is a multiple residential unit and that the affidavits established probable cause, based upon the information from the informant and police surveillance, for 2922 University only. We disagree. Both affidavits contain substantially the same information: a confidential informant, known personally by the affiant and who had proved to be reliable on several past occasions by providing information leading to several narcotics convictions, had recently purchased cocaine on numerous occasions from appellant and an individual believed to be appellant's brother from both front doors of the building; the informant was personally familiar with and able to recognize cocaine; two days before the date of the affidavit the informant saw several vials of cocaine on a table in 2922 University; and the informant knew the drugs were "moved between the floors of the building to avoid a robbery." Although the affidavits refer to police observation of persons known to have narcotics convictions "enter the premises through the front door" without specifying 2922 or 2922A, the information from the informant clearly implicated *both* residences. This information from a reliable informant, corroborated partially by police observation, meets the tests for probable cause set forth in the landmark cases of *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 393 U.S. 410 (1969).

Appellant also argues that the affidavits contained an intentional or reckless misrepresentation of a material fact, citing *Franks* v. *Delaware,* 438 U.S. 154 (1978). Appellant argues that the affidavits erroneously referred to the building as a single family residence and that this reference was necessary to the finding of probable cause. We disagree. As noted by the magistrate[7] in his report, the affidavits contain two statements referr-

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[7] The Honorable William S. Bahn, United States Magistrate.

ing to the building as a single family residence: the informant states the building is "used as a single family dwelling" and the affiants describe the building as "the two story, with an attic, brick constructed single family residence located at 2922 University." Even assuming appellant made a substantial preliminary showing of intentional or reckless misrepresentation, the characterization of the building as a single family residence was not necessary to the finding of probable cause. *See United States* v. *House,* 604 F.2d 1135, 1138-39 & n.5 (8th Cir. 1979), *cert. denied,* 100 S. Ct. 1320 (1980), *citing Franks* v. *Delaware, supra,* 438 U.S. at 155. The informant clearly implicated both floors and both front doors of the building. *See* discussion *supra.*

III. Motion to Disclose Identity of Informant

Appellant argues that the district court erroneously denied his motion to disclose the identity of the informant. Appellant sought disclosure of the identity of the informant in order to determine, in connection with appellant's *Franks* challenge of the warrant affidavits, whether the affiants intentionally or recklessly misrepresented the building as a single family residence. We have already rejected appellant's *Franks* challenge on the ground that the alleged misrepresentation was not necessary to the finding of probable cause. In light of that finding, there is no longer any reason for disclosure in the *Franks* context.[1] Moreover, we note that the Supreme Court in

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[1] On appeal appellant did not argue that disclosure of the identity of the informant was required because the informant was a material defense witness. *See Roviaro* v. *United States,* 353 U.S. 53, 60-61 (1957); *United States* v. *Barnes,* 486 F.2d 776, 778 (8th Cir. 1973). In any case, it would appear from the facts in the present case that the informant was a "mere tipster." *See, e.g., United States* v. *House, supra,* 604 F.2d at 1140; *United States* v. *Davis, supra,* 557 F.2d at 1248-49, *citing Rugendorf* v. *United States,* 376 U.S. 528, 534-35 (1964).

Franks did not decide whether a reviewing court must ever require the disclosure of the identity of an informant once a substantial preliminary showing of falsity has been made. 438 U.S. at 170.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

United States of America, Plaintiff, v.	Cause No. 79-95 CR (1)
Charles H. Gill a/k/a "Papa" Gill, Defendant.	

CRIMINAL INFORMATION

(Filed November 6, 1979)

The United States Attorney charges:

1. That the defendant is presently indicted in United States v. Charles H. Gill a/k/a "Papa" Gill, 79-95 CR(1).

2. Said indictment charges the defendant therein with violation of Title 21, United States Code, Section 841(a)(1) (possession with intent to distribute approximately five (5) ounces of cocaine, a Schedule II narcotic drug controlled substance).

3. The defendant has previously been convicted of violation of Title 26, United States Code, Sections 2554 and 3224 on or about March 23, 1951, a copy of said judgment and commitment order and information attached and incorporated herein as Exhibit "A".

4. The defendant has also previously been convicted of Title 26, United States Code, Sections 4705(a) and 7237(a) on or about October 26, 1956, a copy of said judgment and commitment order and information attached and incorporated herein as Exhibit "B".

WHEREFORE, said defendant having been previously found guilty of felony violations of Federal narcotics statutes prays that the defendant, if convicted, be sentenced by this Honorable Court under the provisions and requirements of Title 21, United States Code, Sections 841(b)(1)(A) and 851.

ROBERT D. KINGSLAND
United States Attorney

/s/ MICHAEL W. REAP
Assistant United States Attorney

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern District of
Missouri
} ss.

I, Michael W. Reap, Assistant United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the foregoing information is true as I verily believe.

/s/ MICHAEL W. REAP

Subscribed and sworn to before me this 6th day of November, 1979.

CLERK, UNITED STATES
DISTRICT COURT

By _____
Deputy Clerk

WAIVER OF INDICTMENT

(Filed March 16, 1951)

District Court of the United States
For The
Eastern District of Missouri
Eastern Division

United States of America,
v.
Charles Herbert Gill
No. 26795(i)

Charles Herbert Gill, the above named defendant, who is accused of violating Sections 3224 and 2554, Title 26, United States Code, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

A TRUE COPY OF THE ORIGINAL

Filed: 3-16-51

Attest: Phillip L. Swihart, Acting Clerk

By: M. Gallant
Deputy Clerk

Charles Herbert Gill
Defendant

Dated: 11-6-79
St. Louis, Mo.

Hans Wulff
Counsel for Defendant,

Dated March , 1951

In The United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. Charles Herbert Gill, Defendant.	September Term, 1950 No. 26795(i)

(Filed March 16, 1951)

The United States Attorney charges:

That on or about the 22nd day of February, A. D. 1951, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid,

CHARLES HERBERT GILL,

being then and there a person who had not registered with, and paid the special tax to, the Collector of Internal Revenue within and for the First Internal Revenue Collection District of Missouri, as required by law of every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative or preparation thereof, did UNLAWFULLY, WILLFULLY, KNOWINGLY and FELONIOUSLY have in his possession and under his control a certain derivative of opium, to-wit, nine (9) grains, more or less, of heroin;

Contrary to the terms and provisions of Section 3224, Title 26, United States Code.

Penalty 26 USC 2557
F nm 2000 or I nm 5 y or b

— SECOND COUNT —

The United States Attorney further charges:

That on or about the 22nd day of February, A. D. 1951, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, CHARLES HERBERT GILL, being then and there a person who had not paid to the Collector of Internal Revenue within and for the First Internal Revenue Collection District of Missouri the special tax required by law of every person who deals in, dispenses, sells, distributes, manufactures, produces, imports or gives away opium or coca leaves, their salts, derivatives or preparations, UNLAWFULLY, WILLFULLY, KNOWINGLY and FELONIOUSLY did sell and give away to one Malcolm Richards a certain derivative of opium, to-wit, nine (9) grains, more or less, of heroin, at and for the price and sum of Twenty Dollars ($20.00), said sale and giving away having been made not in pursuance of a written order of the person to whom the said heroin was sold and given away on a form issued in blank for that purpose by the Secretary of the Treasury, and said heroin was not then and there contained in any container having affixed thereto or attached thereon any taxpaid Internal Revenue stamp;

Contrary to the terms and provisions of Section 2554, Title 26, United States Code.

F nm 2000 or I nm 5 y or b

— THIRD COUNT —

The United States Attorney further charges:

That on or about the 26th day of February, A. D. 1951, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, CHARLES HERBERT

GILL, being then and there a person who had not registered with, and paid the special tax to, the Collector of Internal Revenue within and for the First Internal Revenue Collection District of Missouri, as required by law of every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative or preparation thereof, did UNLAWFULLY, WILLFULLY, KNOWINGLY and FELONIOUSLY have in his possession and under his control a certain derivative of opium, to-wit, twelve (12) grains, more or less, of heroin;

Contrary to the terms and provisions of Section 3224, Title 26, United States Code.

Penalty 26 USC 2557
F nm 2000 or I nm 5 y or b

— FOURTH COUNT —

The United States Attorney further charges:

That on or about the 26th day of February, A. D. 1951, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of the Court aforesaid, CHARLES HERBERT GILL, being then and there a person who had not paid to the Collector of Internal Revenue within and for the First Internal Revenue Collection District of Missouri the special tax required by law of every person who deals in, dispenses, sells, distributes, manufactures, produces, imports or gives away opium or coca leaves, their salts, derivatives or preparations, UNLAWFULLY, WILLFULLY, KNOWINGLY and FELONIOUSLY did sell and give away to one Malcolm Richards a certain derivative of opium, to-wit, twelve (12) grains, more or less, of heroin, at and for the price and sum of Twenty Dollars ($20.00), said sale and giving away having been made not in pursuance of a written order of the person to whom the said heroin was sold

and given away on a form issued in blank for that purpose by the Secretary of the Treasury, and said heroin was not then and there contained in any container having affixed thereto or attached thereon any taxpaid Internal Revenue stamp;

Contrary to the terms and provisions of Section 2554, Title 26, United States Code.

F nm 2000 or I nm 5 y or b

/s/ DRAKE WATSON
United States Attorney

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern Judicial District
of Missouri. } ss.

I, DRAKE WATSON, United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the foregoing information is true as I verily believe.

/s/ DRAKE WATSON

Subscribed and sworn to before me this 16th day of March, 1951.

/s/ JAMES J. O'CONNOR
Clerk, United States
District Court

By /s/ VIOLA MOTTAZ
Deputy Clerk

A TRUE COPY OF THE ORIGINAL

Filed: 3-16-51

Attest: Phillip L. Swihart, Acting Clerk

By: M. Gallant
Deputy Clerk

Dated: 11-6-79
St. Louis, Mo.

JUDGMENT AND COMMITMENT

(Received April 2, 1951)

District Court of the United States
For The
Eastern District of Missouri
Eastern Division

United States of America
v.
Charles Herbert Gill
No. 26795

On this 23rd day of March, 1951 came the attorney for the government and the defendant appeared in person and with Hans Wulff, Esq., his attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of having in his possession a certain derivative of opium; said defendant not being registered with and not having paid the special tax to the Collector of Internal Revenue; unlawfully selling and giving away a certain derivative of opium, not in pursuance of a written order of the person to whom the said heroin was sold and given away, etc. as charged in cts. 1, 2, 3, and 4 of information and the court having asked the defendant whether he has anything to say why

judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS as to and under the charge as contained in EACH of counts one, two, three, and four of the information herein; such terms of imprisonment to begin, run, and terminate concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Geo. H. Moore
United States District Judge

The Court recommends commitment to a Reformatory Type Institution.

James J. O'Connor
Clerk

A True Copy.

Certified this 23rd day of March, 1951

(Signed) James J. O'Connor *(By)* Viola Mottaz
Clerk *Deputy Clerk*

A TRUE COPY OF THE ORIGINAL

Filed: 11-6-79

Attest: Phillip L. Swihart, Acting Clerk

By: M. Gallant
Deputy Clerk

Dated: 11-6-79
St. Louis, Mo.

RETURN

(Filed April 6, 1951)

I have executed the within Judgment and Commitment as follows:

Defendant delivered on March 23, 1951 to St. Louis County Jail

Defendant noted appeal on

Defendant released on

Defendant elected, on not to commence service of the sentence.

Defendant's appeal determined on

Defendant delivered on April 4, 1951 to Federal Reformatory at El Reno, Oklahoma, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

OTTO SCHOEN
United States Marshal

/s/ L. S. Davison
Deputy

A TRUE COPY OF THE ORIGINAL

Filed: 10/12/56

Attest: Phillip L. Swihart, Acting Clerk

By /s/ D. Dickerson
Deputy Clerk

Dated: 11/6/79
St. Louis, Mo.

WAIVER OF INDICTMENT

(Filed October 12, 1956)

District Court of the United States
For The
Eastern District of Missouri
Eastern Division

United States of America v. Charles H. Gill	No. 28734(i)

Charles H. Gill, the above named defendant, who is accused of violating Sections 4704(a), 4705(a) and 4744(a), Title 26, United States Code, and Sections 174, Title 21, United States Code, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of indictment.

/s/ CHARLES H. GILL
Defendant

/s/ Sidwyn Glazer
Counsel for Defendant.

Date October 12th, 1956.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. Charles H. Gill, Defendant.	No. 28734(i)

(Filed October 12, 1956)

The United States Attorney charges:

That on or about the 20th day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri,

CHARLES H. GILL

did unlawfully sell to one James Brooks a certain narcotic drug, to wit, 3 grams, more or less, of heroin, at and for the price and sum of $10.00, said sale having been made not in pursuance of a written order of the person to whom the said narcotic drug was sold on a form issued in black for that purpose by the Secretary of the Treasury of the United States or his delegate.

In violation of Section 4705(a) Title 26, United States Code.

— SECOND COUNT —

The United States Attorney further charges:

That on or about the 20th day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did unlawfully purchase from a person whose name is to the United States Attorney unknown, at and for a price and sum unknown, a certain narcotic drug, to wit, 3 grains, more or

less, of heroin, which said narcotic drug defendant did purchase other than in or from the original stamped package containing the same.

In violation of Section 4704(a), Title 26, United States Code.

— THIRD COUNT —

The United States Attorney further charges:

That on or about the 20th day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did receive and conceal a certain narcotic drug, to wit, 3 grains, more or less, of heroin; he, the said defendant, then knowing said narcotic drug had been imported into the United States of America contrary to law.

In violation of Section 174, Title 21, United States Code.

— FOURTH COUNT —

The United States Attorney further charges:

That on or about the 21st day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant did unlawfully sell to one James Brooks a certain narcotic drug, to wit, 4 grains, more or less, of heroin, at and for the price and sum of $10.00, said sale having been made not in pursuance of a written order of the person to whom the said narcotic drug was sold on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

In violation of Section 4705(a), Title 26, United States Code.

— FIFTH COUNT —

The United States Attorney further charges:

That on or about the 21st day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did unlawfully purchase from a person whose name is to the United States Attorney unknown, at and for a price and sum unknown, a certain narcotic drug, to wit, 4 grains, more or less, of heroin, which said narcotic drug defendant did purchase other than in or from the original stamped package containing the same.

In violation of Section 4704(a), Title 26, United States Code.

— SIXTH COUNT —

The United States Attorney further charges:

That on or about the 21st day of August, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did receive and conceal a certain narcotic drug, to wit, 4 grains, more or less, of heroin; he, the said defendant, then knowing said narcotic drug had been imported into the United States of America contrary to law.

In violation of Section 174, Title 21, United States Code.

— SEVENTH COUNT —

The United States Attorney further charges:

That on or about the 13th day of September, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did unlawfully purchase from a person whose name is to the United States Attorney unknown, at and for a price and sum unknown, a certain narcotic drug, to wit, 94 grains, more or less, of heroin, which said narcotic drug defendant did purchase other than in or from the original stamped package containing the same.

In violation of Section 4704(a), Title 26, United States Code.

— EIGHTH COUNT —

The United States Attorney further charges:

That on or about the 13th day of September, 1956, in the City of St. Louis, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did receive and conceal a certain narcotic drug, to wit, 94 grains, more or less, of heroin; he, the said defendant, then knowing said narcotic drug had been imported into the United States of America contrary to law.

In violation of Section 174, Title 21, United States Code.

— NINTH COUNT —

The United States Attorney further charges:

That on or about the 13th day of September, 1956, in the City of St. Louis, State of Missouri, within the Eastern Division of the Eastern District of Missouri, CHARLES H. GILL, the defendant, did unlawfully acquire or otherwise obtain from a person whose name is to the United States Attorney unknown, 4 grains, more or less, of marijuana; he, the said defendant, being a transferee required to pay the transfer tax imposed by Section 4741(a), Title 26, United States Code, not being then and there registered with the Secretary of the Treasury of the United States or his delegate, and not having paid said transfer tax imposed by said Section 4741(a).

In violation of Section 4744(a), Title 26, United States Code.

/s/ ROBERT C. TUCKER
Assistant United States Attorney

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern District of
Missouri. } ss.

I, ROBERT C. TUCKER, Assistant United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the foregoing information is true as I verily believe.

/s/ ROBERT C. TUCKER

Subscribed and sworn to before me this 28th day of September, 1956.

/s/ JAMES J. O'CONNOR
Clerk, United States
District Court

By /s/ Harold G. Pryor
Deputy Clerk

A TRUE COPY OF THE ORIGINAL

Filed: 10/26/56

Attest: Phillip L. Swihart, Acting Clerk

By D. Dickerson
Deputy Clerk

Dated: 11/16/79
St. Louis, Mo.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. Charles H. Gill, Defendant.	No. 28734(1)

CRIMINAL INFORMATION

(Filed October 26, 1956)

Comes now the United States Attorney for the Eastern District of Missouri, and after the conviction of defendant, Charles H. Gill, in cause No. 28734(1), and prior to pronouncement of sentence therein, informs the Court that the said defendant has heretofore been convicted in the United States District Court for the Eastern District of Missouri, Eastern Division, for a prior violation of the narcotic laws of the United States, to wit:

Said defendant was convicted in the United States District Court for the Eastern District of Missouri, Eastern Division, on or about March 23, 1951, in a case designated as docket No. 26795, on charges of violating Sections 3224, and 2554, Title 26, United States Code.

WHEREFORE, said defendant having been found guilty in the instant case, designated as docket No. 28734(1), plaintiff prays the Court that the said defendant be sentenced in this cause in accordance with the provisions and requirements of Section 7237(a), Title 26, United States Code.

/s/ ROBERT C. TUCKER
Assistant United States Attorney

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern District of
Missouri. } ss.

I, ROBERT C. TUCKER, Assistant United States Attorney for the Eastern District of Missouri, being duly sworn, do say that the foregoing information is true as I verily believe.

/s/ ROBERT C. TUCKER

Subscribed and sworn to before me this 26th day of October, 1956.

/s/ JAMES J. O'CONNOR
Clerk, United States
District Court

By /s/ M. JOSEPH MEEHAN
Deputy Clerk

A TRUE COPY OF THE ORIGINAL

Filed: 11/8/56

Attest: Phillip L. Swihart, Acting Clerk

By: D. Dickerson
Deputy Clerk

Dated: 11/6/79
St. Louis, Mo.

JUDGMENT AND COMMITMENT

(Received November 1, 1956)

United States District Court
For The
Eastern District of Missouri
Eastern Division

United States of America v. Charles Herbert Gill	No. 28734(1) Criminal

On this 26rd day of October, 1956 came the attorney for the government and the defendant appeared in person and with Sidney Glaser, his attorney.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offenses of unlawfully selling to another a certain narcotic drug, said sale having been made not in pursuance of a written order of person to whom said narcotic drug was sold on form issued in blank for that purpose by Secretary of the Treasury of U.S. or his delegate, as charged in Count 1 and 4 of the information; receiving and concealing a certain narcotic drug, he, the said defendant, knowing same had been imported into U.S. of America contrary to law, as charged in Count 8 of information, (whereupon the U.S. Attorney files information of prior conviction in the U.S. Dist. Court of East. Dist. of Mo., on March 23, 1951 under Docket No. 26795 and deft. in open Court affirms that he is the same individual named in said information, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS as to and under the charge as contained in EACH of Counts One, Four and Eight of the information herein; such terms of imprisonment to begin, run, and terminate concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Geo. H. Moore
United States District Judge

James J. O'Connor
Clerk

A True Copy.

Certified this 26th day of October 1956.

(Signed) James J. O'Connor
Clerk

(By) /s/ Robert R. Bowman
Deputy Clerk

DEPARTMENT OF JUSTICE

United States Marshal
Eastern District of Missouri
322 New Federal Bldg. (1)
St. Louis, Mo.

I, Charles H. Gill, do hereby waive the ten-day stay of execution for appeal and request the United States Marshal transfer me to a Federal Institution as directed by the Attorney General.

Dated this 30th day of October, 1956.

/s/ CHARLES GILL

Witness:

/s/ L S. Davison

United States Department of Justice
Bureau of Prisons
U.S. Penitentiary
(Institution)
Leavenworth, Kansas
(Location)

MARSHAL'S REPORT

Date November 1, 1956

Received from Lyle F. Milligan United States Marshal for the Eastern District of Wisconsin-Milwaukee by Russell C. Knight Deputy United States Marshal, the following named United States prisoners, together with commitment papers:

GUARD: Charles A. Kennedy

#73921-L Carl Alfred Norling — 4 years — White
Commitment Case #25009 SD-California-Los Angeles

#73922-L Charles H. Gill — 10 years — Negro
Commitment Case #28734(1) ED-Missouri-St. Louis

TOTAL TWO

Recd. at 2:00

C. H. LOONEY, WARDEN
(Warden) *(Superintendent)*

By CARL F. ZARTER
Record Clerk

(Signed) _____ *(By)* _____
Clerk *Deputy Clerk*

APPENDIX C

In The
United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. Charles H. Gill a/k/a "Papa" Gill, Defendant.	No. 79-95CR(1)

DEFENDANT CHARLES H. GILL'S MOTION TO DISMISS CRIMINAL INFORMATION

Comes now the defendant herein, Charles H. Gill, by and through his attorneys, Wolff, Frankel & Passanante, and moves this Honorable Court dismiss the criminal information filed herein on or about November 6, 1979.

In support of said motion to dismiss, the defendant, by and through his attorneys, informs this Honorable Court that:

1. On or about November 5, 1979, the parties herein appeared in Court and informed the Court that defendant would waive his right to a jury trial and submit the cause to the Court on stipulated facts. The parties were ordered to prepare said stipulation, and the file reflects that the trial commenced.

2. On or about November 6, 1979, the Assistant United States Attorney filed on behalf of the government a criminal information attempting to invoke the provisions of Title 21, United States Code, Sections 841(b)(1)(a) and 851.

3. Defendant contends that the filing of the criminal information on November 6, 1979, does not comply with the provisions of Title 21, United States Code, Section 851 in that the criminal information was not filed before the trial commenced.

WHEREFORE, defendant herein, by and through his attorneys, moves this Honorable Court dismiss the criminal information filed on or about November 6, 1979, and make such other and further orders as to this Honorable Court seems just and proper in the circumstances.

WOLFF, FRANKEL & PASSANANTE

By Donald L. Wolff (#18008)
Attorneys for Defendant
8019 Forsyth
Clayton, Missouri 63105
725-8019

Copy hereof delivered this ____ day of November, 1979, to Michael W. Reap, Assistant United States Attorney, 1114 Market Street, St. Louis, MO 63101

APPENDIX D

Affidavit For Search Warrant

(Filed July 26, 1979)

I, Det. Joseph Mokwa, currently assigned to the Fifth District Detective Bureau, depose the following to wit;

I have been with a confidential informant who has proven himself to be reliable on five occassions with the last three years. I have known this source for this period of time and his information has resulted in four convictions of illegal possession of narcotic drugs, with two cases pending in the Circuit Court at this time for similar offenses.

This source states that he has purchased cocaine on numerous occassions from a couple of negro males who reside at 2922 University. This source further states that on most occassions he buys cocaine in quantities of from $50 to $400 from a negro male in his forties known to the source as "Papa Gill". This source states that "Papa Gill" or his brother (name unknown) sells the cocaine from both the front doors, depending upon which floor the drugs were being kept on that date. The source was inside the first floor premises on 7-19-79 and observed several "vials" of cocaine in the center room lying on a table. The source purchased some of the drug for his own use and recognized the drug through previous existence. The source states the drugs are moved from one floor to the other to avoid a robbery.

This officer conducted several surveillances of this address during the weeks of 7-9-79 and 7-16-79 and observed several persons with narcotic convictions to enter the premises through the front door and remain inside for several minutes.

Due to the proven reliability of the informant and these officers own observations, it is requested that a search warrant be issued

for the two story, with an attic, brown brick, single family dwelling, having two front doors, located at 2922 University, same being within the City of St. Louis Mo.

Subscribed and sworn to before me this date, 7-21-79, at 11:24 AM.

/s/ JAMES MOKER
Detective

/s/ LACKLAND H. BLOOM
Judge

Affidavit For Search Warrant

I, Det. Peter Gober, currently assigned to the Intelligence Unit, depose the following to wit;

I have met with a confidential informant who has proven himself to be reliable three times within the last two weeks. All three cases resulted in convictions for narcotic offences. This informant states that he has been purchasing cocaine from a subject he knows as "Papa Gil" and another man he believes is "Papa Gil's brother". This source states he has purchased cocaine in quantities of from $50 to $400 and most recently purchased cocaine from these persons on 7-19-79. All of these purchases were made at the home of "Papa Gil" located at 2922 University. The informant concludes that he has seen several vials of cocaine in a center room located on the first floor of the two story residence but knows that cocaine is kept on both floors of the residence because he has bought cocaine from both front doors, 2922 and 2922A University although the residence is used as a single family dwelling.

This officer has conducted several surveillances of this two story brick residence during the weeks of 7-9-79 and 7-16-79 and observed numerous persons with narcotic possession convic-

tions to enter the premises through the front door and remain inside for several minutes.

Based upon the proven reliability of this informant and these officers own observations, it is requested that a search warrant be issued for the two story, with an attic, brick constructed single family residence located at 2922 University, same being with the City of St. Louis Mo.

Subscribed and sworn to before me this date, 7-21-79, at 11:25 AM.

/s/ PETER GOBER
Detective

/s/ LACKLAND H. BLOOM
Judge